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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1404

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Petitioners,

v.

TERRI LEE HALDERMAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICI CURIAE BRIEF OF NEW YORK, ILLINOIS, WASHINGTON, NEW HAMPSHIRE AND WEST VIRGINIA IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit appears at 612 F. 2d 84.

The opinion and order of the United States District Court for the Eastern District of Pennsylvania both appear at 446 F. Supp. 1295.

Consent of the Parties

Consent of the parties is not required since this brief on behalf of the States of New York, Illinois, Washington, New Hampshire, and West Virginia as Amici Curia is sponsored by their respective Attorneys General. U.S. Sup. Ct. R. 42.

Interest of Amici Curiae

The State of New York through its Office of Mental Retardation and Developmental Disabilities (hereinafter "OMRDD") currently spends in excess of one half billion dollars annually in providing a wide spectrum of services to developmentally disabled individuals within New York State. A portion of those funds goes toward purposes such as research, prevention, and public education. The major allocation of New York's resources, however, is to the active, direct care and treatment of the developmentally disabled, both in the state's 19 developmental centers and its many hundreds of community living alternatives.*

The State of Illinois, Department of Mental Health and Developmental Disabilities (DMHDD) provides services to the second largest population of developmentally disabled (DD) individuals found in the United States. Illinois DD patient population at present includes 5,964 in State operated facilities (in-patient), 4,377 in State operated clinics (out-patient), and 26,916 in community based facilities. It has been estimated that 122,255 people within the State of Illinois suffer from some developmental disability. At the present time Illinois is involved in developing a comprehensive plan of deinstitutionalization in order to effectuate the requirements not only of the law, but also of good clinical practice. The deinstitutionalization plan (DI plan) entails years of planning for the eventual placement of DD individuals presently receiving care in state operated facilities into community based facilities more appropriate to their needs. Pursuant to the DI plan it is projected that the number of in-patient days for the average patient will drop from 45,043 in 1970 to 3,193 in 1982. Approximately one hundred eighty million dollars will be spent by Illinois in fiscal year 1980 to maintain its state operated facilities for the developmentally disabled. Sixty two million dollars

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* New York State's program is more fully described in Point IA *infra*.

will be spent in the same fiscal year in grants to community based facilities.

Washington State provides care and habilitation for developmentally disabled persons through a variety of residential and non-residential services. There are five (5) residential schools for the mentally retarded in the state serving approximately 2,100 persons with a planned population of 1,750 by July, 1982. Each of these five state schools received federal monies and is certified as an ICF/MR. These state scools are operated by the Department of Social and Health Services. The Department is presently operating under a system-wide five year program of compliance adopted pursuant to 45 CFR 249.12 and 249.13 which provides a detailed timetable for accomplishing the required staffing improvements and physical renovations necessary to meet regulations. The state plans were approved by DHEW Region 10, Seattle, Washington.

A major construction plan has been implemented to demolish outmoded buildings and replace them with smaller and newer facilities for residential care at these five central core facilities. In addition, Washington has increased funding for community services. In contrast to ten years ago when community programs only constituted 3 percent of the total Developmental Disabilities budget, the Legislature in 1979 increased this to 27 percent of the total budget of $158,022,600. This does not include funds for a) special education funds for local school districts; b) Vocational Rehabilitation funds for DD clients; c) Community ICF/MR facilities—Title XIX Medicaid; d) Social Security and other client benefits expended for services; and e) county funds.

Each of the States joining in this amici brief, is defending at this time, at least one major litigation, brought as a class action, raising many of the issues decided by the Courts below in this action, relating to the method of and extent to which they provide care and treatment for the mentally retarded. Those cases include: *Society for Goodwill to Retarded Children, Inc.* v. *Carey,* 78-C-1847

(E.D.N.Y.); *Illinois Association for Retarded Citizens et al.* v. *Governor James Thompson et al.*, 80-C-0914 (N.D. Ill., E. Div.); *Washington Association for Retarded Citizens, et al.* v. *Thomas*, C-79-1235V (W.D. Wash.) *Garrity et al.* v. *Gallen, et al.*, 78 C. 116 (D.N.H.) and *Medley Macel et al.* v. *Leon Ginsberg, Commissioner of West Virginia, Department of Welfare, et al.*, 78 Civ. 2099 CH (W. Va., S.D.)

New York State and those states joining with it in this petition have a very real and substantial interest in obtaining the clearest and earliest possible guidance from this Court. Short and long-term planning of services can be effective only if state policymakers and administrators know that their planned services and time frames do not conflict with federal requirements as directed by individual district courts. State officials must be advised as soon as possible whether receipt of funding under 42 U.S.C. § 6000 et seq., the Developmentally Disabled Assistance and Bill of Rights Act (hereinafter the Act) obligate them to restructure their complex service systems and if so, to what extent and pursuant to what guidelines, so that their multimillion dollar programs of aid to the developmentally disabled can comport with the requirements of applicable federal statutes and constitutional provisions.

Statement of the Case

This is a class action lawsuit, brought on behalf of all current and future residents of the Pennhurst State School and Hospital, alleging that the facility is operated in a manner that violates its mentally retarded residents' constitutional and statutory rights.*

After an extensive trial, the District Court (*Broderick*, J.) found that the facility violated its residents' constitu-

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* The parties below did not contest the claim that Pennhurst was, under any test, an inadequate facility, nor by presenting this brief, are amici states condoning in any way the conditions which existed at Pennhurst.

tional right to "habilitation", *Halderman* v. *Pennhurst State School and Hospital,* 446 F. Supp. 1295, 1314, 1321 (E.D. Pa. 1977), as well as their statutory right to "non-discriminatory habilitation" under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, *id.* at 1323. Rather than ordering that the facility be improved, the District Court ordered that the facility be closed and appointed a master to supervise the transfer of residents into the community, *id.* at 1325.

On appeal, the Third Circuit Court of Appeals largely affirmed the relief ordered below, but relied on an entirely different legal approach than had the District Court, *Halderman* v. *Pennhurst State School and Hospital,* 612 F. 2d 84 (3d Cir. 1979), basing its decision on federal and state statutory grounds, without reaching the constitutional issues decided by the District Court. The majority ruled that Congress was legislating to implement the Fourteenth Amendment when it passed the Act, *id.* at 98, and that the Act provided the developmentally disabled with a private right of action and a right to habilitation, *id.* at 95, which must be provided in the setting that is least restrictive to personal liberty, *id.* at 107. The Third Circuit further held that there was a presumption in favor of community-based care, but modified the lower court order so as to permit the continued operation of Pennhurst for those for whom the presumption could be rebutted.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Raises Significant Questions With Regard To The Construction Of Federal Statutes Intended To Aid The Mentally Retarded Which Are Of Great Public Interest To Each State Receiving Federal Funds And Administering A Program For the Mentally Retarded

The decision of the Court below, as framed, mandates that any state receiving funds under the Act pursue a method of habilitation for the mentally retarded which

favors community placement and which guarantees a right to habilitation in the least restrictive environment, both under the supervision of a court appointed master if necessary. In basing its holdings in large part* on federal statutes passed to implement the Fourteenth Amendment, which apply equally to the amici states, the decision of the Court below necessarily affected the administration of each program for the mentally retarded operated by an amicus state.

A. New York is presently making tremendous financial investments in its program of care and habilitation for the mentally retarded which could be declared misguided upon ultimate judicial resolution of these significant legal questions.

A recent estimate based on the disability prevalence rate, is that there are approximately 376,659 developmentally disabled persons in New York State. At the end of the fiscal year 1979-80 there were just under 14,000 developmentally disabled persons residing in the 19 inpatient residential facilities operated by the State Office of Mental Retardation and Developmental Disabilities. These facilities vary in size from about 120 residents to over 2000 residents.

The Department is presently operating under a systemwide five year program of compliance adopted pursuant to former 45 CFR 249.12 and 249.13 (new 42 CFR 112 *et seq.*) which contains a detailed timetable for accomplishing the required staffing improvements and physical renovations necessary to meet federal regulations. The plans of correction were approved by DHEW Region II, Office of Long Term Care and Standards Enforcement.

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* The Third Circuit based part of its holding on Pennsylvania Statutes which would have no bearing on the amici states. The District Court had based its holding on a federal constitutional right to habilitation in community facilities—a holding which would impact *all* the states.

Pursuant to the plan, the number of institutionalized clients will be 11,459 by the end of fiscal year 1980-1981, and 9,919, the certified occupancy rate, by the end of fiscal year 1981-82.

In addition to developmentally disabled clients living in developmental centers, OMRDD has established, with the necessary assistance of voluntary agencies and other third-parties providers, a broad range of alternative living arrangements. Those alternative living arrangements consist of community ICF/MR's, skilled nursing facilities, and community residences which are subdivided into apartments, community residences, and family living situation. In addition, New York provides or funds a wide range of day program alternatives, including day training, day treatment and sheltered workshop programs.

In order to carry out the goals stated in the OMRDD-Five Year Comprehensive Plan and the 1980 Update, the Legislature has appropriated for OMRDD purposes approximately $700,000,000 for fiscal year 1980-81. Almost $500,000,000 of this is allocated for state purposes, the bulk of which is directed toward prevention and the care of the mentally retarded and developmentally disabled. Some other items receiving substantial state purposes funds are quality assurance, the family care-personal care program and research in mental retardation.

Another major portion of the OMRDD budget is for local assistance, totalling approximately $100,000,000. These funds are provided to carry out the purpose in Article 41 of New York's Mental Hygiene Law, to assist local governments in the care and habilitation of the developmentally disabled.

In addition, there is a $29,000,000 capital construction appropriation, which serves two purposes. The first is state aid to municipalities and other public and not-for-profit private agencies for acquisition of property, construction and rehabilitation of community mental retarda-

tion facilities, pursuant to Article 41 of New York's Mental Hygiene Law. Second, capital construction funds are appropriated for the alteration and improvements of state-operated facilities to achieve compliance with federal standards relating to intermediate care facilities for the mentally retarded and the Consent Judgment reached by the parties to the *Willowbrook* case, *New York State Association for Retarded Children, Inc., et al.* v. *Carey*, 72 C. 356/357 (E.D.N.Y.). The balance of approximately $57 million dollars goes largely to residential and non-residential services, support programs and specialized programs denominated "prevention and care maintenance undistributed." The structure of the budget emphasizes the high degree of reliance on and cooperation with local governments and third-party providers needed to implement the State's plans for deinstitutionalization.

Despite the large amount of money being spent by New York for the mentally retarded, resources are limited. There is a delicate balance drawn by the Legislature and Executive allocating these resources for distribution over the vast array of services provided and responsibilities assumed by the State, both for the mentally retarded and for all other undertakings of the State. Moreover, in spite of the enormous investment by New York State in appropriate programs and living arrangements for the developmentally disabled, and the very substantial gains made by New York State in deinstitutionalizing its developmentally disabled clients, an even vastly greater undertaking by New York would be required to comply with the Third Circuit's decision below.

Clearly, the scale and scope of New York's programs for the mentally retarded make it extremely important to New York to receive from the highest possible authority, at the earliest possible opportunity, a clear understanding as to whether the State is directing its efforts and funds in a statutorily and/or constitutionally appropriate fashion. Should the mandate of the Supreme Court warrant re-

structuring of New York's system, such a ruling would permit development at the earliest opportunity of a proper long term program with any changes in emphasis or financial allocations which may be necessary. Furthermore, timely Supreme Court resolution can allow this restructuring, if mandated, to occur through efficient system-wide administrative and legislative direction, without necessitating the intervention of federal courts and federal masters.

B. Litigation similar to Pennhurst, pending in the *amici* states, would benefit from an early ruling on issues that have already produced a conflict among the circuits.

At present, there are inconsistent and varying adjudications with respect to the constitutionally and/or statutorily mandated requirements which a state must meet in providing services to the mentally retarded. See, e.g. *Kentucky Association for Retarded Citizens* v. *Conn,* W.D. Kentucky, C 78-0157 LA Memorandum Decision dated 3/21/80; *Wyatt* v. *Stickney,* 344 F. Supp. 387 (W.D. Ala., 1972) aff'd in part, remanded in part, reversed in part, *Wyatt* v. *Aderholt,* 503 F. 2d 1305 (5th Cir. 1974). This ambiguity in applicable legal principles serves to foster costly, complex class-action litigation, as well as to introduce substantial uncertainties into the process of long-term planning for the deliver of services to the mentally retarded and developmentally disabled.

New York is presently defending itself in a major, complex litigation brought on behalf of a purported class, which presents claims for relief very similar to those sought by plaintiffs in the *Pennhurst* litigation, including the placement of all of a developmental center's residents into community facilities. Plaintiffs in that suit, *Society for Good Will to Retarded Children, Inc.* v. *Carey, et al.,* 78 C. 1847 (E.D.N.Y.) allege that

> "Defendants have failed to provide plaintiff and others similarly situated with constitutionally and statutorily

> mandated levels of care, habilitation, training, education and treatment in a manner or place designed or capable of maximizing the developmental potential of each individual and same are not provided in a setting which is the least restrictive of each individual's personal liberty, all of which can only be provided in community residences and not in residential institutions such as SUFFOLK DEVELOPMENTAL CENTER."

The problems presented by this lawsuit, where applicable legal principles are uncertain, include the following:

1) Neither the parties nor the Court can tailor the case to established legal principles, thus greatly increasing the cost, complexity and duration of the trial.

2) Since the relief, if any, will be limited to residents of a particular facility, deficiencies would not be addressed on a system-wide basis, possibly resulting in inconsistent standards within the same state, and the drawing of resources from one group to another, in order to comply with orders favoring the plaintiffs.

A definitive statement from this Court as to the requirements, if any, imposed upon New York, which receives limited funds under the Act, would serve to refine the issues presented to the District Court for ruling, thereby reducing the costs, complexity and duration of a trial and allowing for more resources to be devoted to patient care and planning.

The pendency of *Society for Good Will* and the knowledge that appellate review in that action is at least one year away, makes most desirable the early review by this Court of a case raising similar statutory and constitutional claims, and which is the only case ready for review. The uncertainty within the State as to whether it will be able to proceed with its ICF/MR plan, and other long-term ob-

jectives, as presently intended, or whether there will be a radical restructuring of services based upon a district court interpretation of the Act, the Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794 or the Constitution, could be alleviated by timely Supreme Court settling of responsibilities. Of equal importance, this resolution would permit a system-wide response, as opposed to a facility-specific response that results from one facility's being subject to a right-to-habilitation suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 8, 1980

Respectfully submitted,

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